

**FILED**  
JUL 27 2007  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON

Supreme Court No. 80115-1

---

**THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

---

THURSTON COUNTY,  
Petitioner,

v.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS  
BOARD and FUTUREWISE  
(formerly known as 1000 Friends of Washington),  
Respondents,

&

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,  
OLYMPIA MASTER BUILDERS, and PEOPLE FOR RESPONSIBLE  
ENVIRONMENTAL POLICIES,  
Petitioner-Intervenors.

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
07 JUL 27 AM 8:00  
BY RONALD R. CARPENTER  
CLERK

---

**FUTUREWISE'S ANSWER  
TO KITSAP COUNTY'S *AMICUS* BRIEF IN SUPPORT OF  
THURSTON COUNTY'S PETITION FOR REVIEW**

---

Tim Trohimovich, WSBA No. 22367  
Attorney for Futurewise

**Address and Telephone Number:**

Futurewise  
814 Second Avenue, Suite 500  
Seattle, Washington 98104  
(206) 343-0681, Ext. 118 (telephone)  
(206) 709-8218 (facsimile)  
[tim@futurewise.org](mailto:tim@futurewise.org) (e-mail)

## Table of Contents

<u>Section</u>	<u>Page</u>
<i>I. Introduction .....</i>	<i>1</i>
<i>II. Argument .....</i>	<i>2</i>
A. Thurston County admitted and the record shows that the County did not use a market factor in determining its urban growth areas.....	2
B. Neither Thurston County nor the Intervenors assigned error to the Board's finding of fact that a market factor was not used; therefore it is a verity in this appeal.....	4
C. The Western Board did not use a bright line rule in this case.....	6
<i>III. Conclusion .....</i>	<i>8</i>

## Table of Authorities

<u>Authority</u>	<u>Page</u>
<b>Cases</b>	
<i>Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.</i> , 113 Wn. App. 615, 53 P.3d 1011 (2002) .....	5
<i>Seattle School Dist. No. 1 of King County v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978) .....	5
<i>Thurston County v. Cooper Point Ass'n</i> , 148 Wn.2d 1, 57 P.3d 1156 (2002) .....	7
<i>Thurston County v. Western Washington Growth Management Hearings Bd.</i> , 137 Wn. App. 781, 154 P.3d 959 (2007) .....	5, 6
<b>Statutes</b>	
RCW 36.70A.110 .....	1, 4
<b>Growth Board Cases</b>	
<i>1000 Friends of Washington v. Thurston County</i> , WWGMHB Case No. 05-2-0002 Final Decision and Order (July 20, 2005) .....	5, 7

## **I. Introduction**

Kitsap County's *Amicus* Brief in Support of Thurston County's Petition for Review (Kitsap County's *Amicus* Brief) argues that the Washington State Supreme Court should take review of the Western Washington Growth Management Hearings Board and Court of Appeals decisions in this case to determine whether the Boards and the Courts are properly affording deference to cities and counties, properly recognizing local discretion, and properly applying the burden of proof in Growth Management Act (GMA) cases.<sup>1</sup>

Kitsap County bases its argument on the "market factor" that counties may use when determining urban growth areas.<sup>2</sup> Unfortunately, Kitsap County's entire argument is based on a mistake of fact. Thurston County never used a market factor in determining its urban growth areas. Indeed, as this answer will illustrate, one of the reasons this case is poorly suited to review by the Supreme Court is that many of the issues raised by Thurston County hinge on the very specific facts of this case. For this

---

<sup>1</sup> Kitsap County's *Amicus* Brief p. 8.

<sup>2</sup> RCW 36.70A.110(2) "An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses."

reason, the Supreme Court's resolution of this case is unlikely to provide much guidance to local governments, the Growth Boards, or the courts.

## II. Argument

### A. **Thurston County admitted and the record shows that the County did not use a market factor in determining its urban growth areas.**

In oral argument before the Board, the County conceded that the county never used a market factor in determining its urban growth areas.

Mr. [then Thurston County Deputy Prosecuting Attorney]  
Miller: I don't think we considered a market factor.

Ms. Gadbaw [a Board Member]: I mean, so –

Mr. Miller: I think that's just a percentage of –

Ms. Gadbaw: Land that's left over.

Mr. Miller: – land that's left over. ....

Ms. Hite [a Board Member]: That's in excess of what your demand indicates you need.

Mr. Swensson [a Senior Planner with the Thurston Regional Planning Council, the corporate author of the *Buildable Lands Report*]: Yes.<sup>3</sup>

---

<sup>3</sup> Report of Proceedings (RP) (The transcript of the Hearing on the Merits before the Board) p. 2 & p. 159; Thurston Regional Planning Council, *Buildable Land Report for Thurston County*, (September 2002) AR 37 p. 002371. Hereinafter "*Buildable Lands Report*."

The *Buildable Lands Report* which provided the technical data for sizing the urban growth area never uses the term “land market supply factor” or any similar term and never recommends that one be used.<sup>4</sup> The *Buildable Lands Report* also shows that the left over lands, to use Mr. Miller’s term, that happened to total 38 percent of the total residential capacity of the urban growth area, was not a market factor. The 38 percent and the other excesses of supply over demand are the “[p]ercent [r]emaining in 2025.”<sup>5</sup> This is consistent with Mr. Miller’s and Mr. Swensson’s answers at the Board’s Hearing.

The Thurston County Comprehensive Plan also does not include a market factor.<sup>6</sup> In fact, nowhere in the record is any documentation showing the county included a market factor in its determination of urban growth areas, let alone included a “reasonable” market factor as the GMA requires.

---

<sup>4</sup> *Buildable Lands Report* pp. II-1 – II-46, AR 37 pp. 002374 – 419 & Thurston Regional Planning Council, *Buildable Lands Report for Thurston County: Technical Documentation* pp. 1 – 68 (September 2002) AR 37 pp. 002427 – 94.

<sup>5</sup> *Buildable Lands Report* p. II-22 & p. II-37, AR 37 p. 002395 & p. 002410. The 38 percent used by the county is the percentage of the total land supply, not the land needed to accommodate the county’s increased population based on the county’s adopted population projection, which will be vacant in 2025.

<sup>6</sup> *Thurston County Comprehensive Plan Land Use Chapter* pp. 2-11 – 2-12, AR 16 pp. 000380 – 81.

So all of Kitsap County's arguments that the Board and Court should have showed the County's market factor more deference or that the County was required to justify its market factor fail.<sup>7</sup> There was no market factor.

This is clearly not the case for the Supreme Court to analyze the "reasonable land market supply factor" provisions of RCW 36.70A.110 because Thurston County did not use a market factor. Nor is this the case to analyze whether the Boards and Courts are properly affording deference to cities and counties, properly recognizing local discretion, and properly applying the burden of proof in GMA cases where a market factor was used. Again, the record and Thurston County all agree a market factor was never used in this case.

**B. Neither Thurston County nor the Intervenors assigned error to the Board's finding of fact that a market factor was not used; therefore it is a verity in this appeal.**

Even though substantial evidence in the record shows that Thurston County did not use a market factor in its urban growth area determinations, any argument by a party, intervenor, or *amicus* that the county did use a market factor fails because neither Thurston County nor

---

<sup>7</sup> Kitsap County's *Amicus* Brief pp. 2 – 8.

the Intervenor assigned error to the Board's finding that the county did not use a market factor. Based on our arguments and evidence the Board correctly found that:

26. The County's allocation of residential urban lands (18,789 acres) exceeds its projected 2025 demand for such lands (11,582 acres) by 7,205 acres.

27. Nowhere in the County's comprehensive plan is it indicated that a 38 percent market factor was utilized to increase the amount of acreage that is needed to accommodate projected urban residential growth.<sup>8</sup>

The Court of Appeals summarized these findings of fact and ruled that since neither Thurston County nor the Building Industry Intervenor assigned error to these findings of fact they are verities on appeal.<sup>9</sup> The Court of Appeals statement of the law is correct. If a party or intervenor does not assign error to a finding of fact it is a verity on appeal.<sup>10</sup>

---

<sup>8</sup> *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002 Final Decision and Order p. \*34 of 37 (July 20, 2005) AR 39 p. 002572. Hereinafter "FDO."

<sup>9</sup> *Thurston County v. Western Washington Growth Management Hearings Bd.*, 137 Wn. App. 781, 803 – 04, 154 P.3d 959, 970 (2007).

<sup>10</sup> *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 488 – 89, 585 P.2d 71, 79 – 80 (1978); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn.App. 615, 628, 53 P.3d 1011, 1017 (2002) review denied *Manke Lumber Co. v. Central Puget Sound Growth Management Hearings Board*, 148 Wn.2d 1017, 64 P.3d 649 (2003).



**C. The Western Board did not use a bright line rule in this case.**

In perhaps its most strained argument, Kitsap County points out that Futurewise argued that the left over lands, if they are a market factor, are not a “reasonable” market factor as the GMA requires because it exceeded 25 percent of the capacity needed to accommodate future growth. Kitsap County then resorts to a Central Puget Sound Growth Management Hearings Board case that the Western Board did not cite for the proposition that this is a “bright line rule.” But again, the Board did not rule that the market factor violated the GMA because it was greater than 25 percent. The Board found there was no market factor. As the Court of Appeals correctly explained:

¶ 63 The County and Intervenors also argue that the Board exceeded its statutory authority by imposing a bright-line rule allowing only a 25 percent market factor. But the Board did not impose such a rule. The Board referred to a 25 percent market factor in explaining the parties' positions, citing to Futurewise's brief.<sup>FN12</sup> The Board concluded only that the County's UGA boundaries “significantly exceed[ed]” the projected demand for urban residential lands, and that without designating the excess as market factor and explaining the need for it, the County's expansion of its UGAs failed to meet GMA goals. AR at 2573.

FN12. The 25 percent market factor also appears in the Board's issue statements, but these are taken verbatim from Futurewise's petition.<sup>11</sup>

What is Kitsap County's response? "While the Court of Appeals rejected an argument that the Western Board applied this rule, it is not entirely clear from the *1000 Friends* decision that the Board did not implicitly invoke it."<sup>12</sup>

But it is clear the Board did not invoke it. The Board found there was no market factor, period.<sup>13</sup> And, as we have seen, this finding is both a verity in this appeal and supported by substantial evidence in the record.

Further,

Under the judicial review provision of the APA, the "burden of demonstrating the invalidity of [the Board's decision] is on the party asserting the invalidity." RCW 34.05.570(1)(a).<sup>14</sup>

That would, in this case, include Kitsap County. But here Kitsap County makes no attempt to meet its burden; rather the county tries to shift the burden to Futurewise. This is the same Kitsap County that accuses the Board of burden shifting as to the non-existent market factor.

---

<sup>11</sup> *Thurston County v. Western Washington Growth Management Hearings Bd.*, 137 Wn. App. 781, 804 – 05, 154 P.3d 959, 970 (2007).

<sup>12</sup> Kitsap County's *Amicus* Brief p. 8.

<sup>13</sup> FDO p. \*34 of 37, AR 39 pp. 002572.

<sup>14</sup> *Thurston County v. Cooper Point Ass'n.*, 148 Wn.2d 1, 7 – 8, 57 P.3d 1156, 1159 – 60 (2002).

### **III. Conclusion**

In sum, despite Kitsap County's use of decisions made by other Growth Boards in other cases, the Board in this case did not apply bright line rules, or really any rules as to market factors. As we have seen, Thurston County did not include, as is its right and as it told the Board, a market factor in determining its urban growth areas. Since Kitsap County's arguments that the Supreme Court should take review of this case are entirely based on allegations that the Board and Court did use such rules as to a market factor, Kitsap County's arguments all fail.

However, as our answer to the Kitsap County's Amicus Brief illustrates, the resolution of many of the issues in this case rely not on the GMA, but on the detailed facts of the record of this case. Because of the highly fact-based nature of this case, any Supreme Court decision is unlikely to benefit local governments, the Growth Boards, or the courts. This case is just too fact-based and the facts are too specific to warrant review by the Supreme Court.

Respectfully submitted July 26, 2007

A handwritten signature in black ink, appearing to be 'Tim Trohimovich', written over a horizontal line.

Tim Trohimovich, WSBA No. 22367  
Attorney for Futurewise, Respondent